

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

G.R.P. MECHANICAL COMPANY, INC.)	
)	
<i>Respondent,</i>)	
)	
<i>and</i>)	Case: 14-CA-211817
)	
GEORGE SUGGS, an individual)	
)	
<i>Charging Party,</i>)	

RESPONDENT’S POST-HEARING BRIEF
TO ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.42 of the Rules and Regulations of the National Labor Relations Board (the “Board”), Series 8, as amended, Respondent G.R.P. Mechanical Company, Inc. (“GRP”) files this post-hearing brief with the Honorable Administrative Law Judge Charles J. Muhl.

I. INTRODUCTION

George O. Suggs (“Charging Party” or “Suggs”), counsel for International Brotherhood of Teamsters, Local Union No. 525 (the “Union”), filed the original charge in this case as an individual on December 18, 2017. Suggs filed an amended charge as an individual on February 16, 2018. The Regional Director for Region 14 of the Board issued a complaint against Respondent on March 29, 2018. Administrative Law Judge Charles J. Muhl conducted the hearing in this case in St. Louis, Missouri on May 15 and 16, and June 8, 2018.

In substance, the Complaint alleges that Respondent refused to hire Mike Hamilton at the Wood River Refinery because he engaged in union and protected concerted activities over a decade ago. The Complaint further alleges that Respondent refused to hire Bob Hamilton, Mike Hamilton's brother, at the Wood River Refinery to discourage Mike Hamilton from engaging in union or protected concerted activities. Significantly, the Complaint does not allege that Respondent violated the National Labor Relations Act (the "Act") by refusing to hire either Mike or Bob Hamilton for any position other than a position at the Wood River Refinery.

In its Answer, filed on April 11, 2018, Respondent denied the substantive allegations of the Complaint. In its Amended Answer, filed on May 10, 2018, Respondent continued to deny the substantive allegations of the Complaint, but further asserted that the Complaint should be dismissed and the matter deferred for resolution through the parties' grievance/arbitration process.

For the reasons stated in its Answers and in this brief, Respondent urges the Administrative Law Judge to dismiss the Complaint in its entirety or alternatively, to defer the substantive allegations of the Complaint for resolution through the parties' grievance/arbitration process.

II. THE FACTS

GRP is a general and mechanical contractor performing services predominantly in the petrochemical industry. The Company derives thirty percent (30%) of its revenue from general contracting services performed for Phillips 66 at its Wood River, Illinois refinery (the "Refinery") and for Afton Chemical (tr. 147). GRP also performs design-build work for school and institutional buildings, evaluating energy usage and designing mechanical systems to maximize

energy efficiency (tr. 147). The third component of GRP's business is fabrication work. GRP fabricates sheet metal and insulation blankets (tr. 148). GRP also performs some service work on HVAC and plumbing systems (tr. 148). At any point in time, GRP has approximately one hundred fifty (150) projects open (tr. 148), and it employs between five hundred fifty (550) and one thousand (1,000) employees, roughly forty percent (40%) of whom work at the Phillips 66 Refinery (tr. 148).

Tom DeClue III (nicknamed "T3") is the President of GRP. He has held that position since 2008 (tr. 144). T3 succeeded his father Tom DeClue, Jr. ("T2") who remains a dues-paying member of Teamsters Local 525. T3 is also a dues-paying member of Pipefitters, Local 553 in Wood River, Illinois (tr. 145). Most of GRP's Board of Directors, including its Executive Vice President, are current union members (tr. 146). The heads of most of GRP's nine divisions are also card-carrying, dues paying trade union members (tr. 146).

GRP assumed responsibility for the Phillips Refinery maintenance operations in November 2017. Before that date, AECOM, the largest construction and engineering firm in the world, contracted to perform the Refinery's maintenance operations (tr. 62, 150, 154). GRP convinced Phillips to award it the maintenance contract by touting its close ties with the Union crafts working on the project. GRP enlisted the aid of the Business Managers for each craft, including the Teamsters, to commit in writing that work on the project would not be impaired by inter-union jurisdictional disputes (tr. 57, 151-152). GRP also won support of the craft unions by working to restore premium pay for working foremen that AECOM had eliminated (tr. 153). The Business Manager for Teamsters Local 525 (the "Teamsters") testified that GRP had

the best interests of all the crafts at heart when it obtained the Refinery contract (tr. 58).
Indeed, GRP is known as a contractor that is a friend of organized labor (tr. 54).

The contractors and crafts at the Refinery operate under a project labor agreement called the General Presidents' Project Maintenance Agreement or "GPPMA" (RX-5, tr. 154). That agreement covers a multitude of crafts working on the jobsite including the Teamsters. One purpose of the GPPMA is to eliminate traditional craft jurisdictional lines and permit any worker qualified to perform a particular task to perform the task irrespective of their craft jurisdiction (tr. 154-155). This provision of the GPPMA prevents loss of productive time caused by inter-union squabbles over jurisdictional lines. The GPPMA does not prevent disagreements between union crafts over jurisdictional lines, but it prevents the disagreements from escalating into work stoppages by providing a mechanism for resolving the dispute without involving the customer (tr. 254, 204).

The Refinery is the largest Phillips refinery in the world. It is the size of a small city. GRP employs hundreds of workers from a variety of crafts at the Refinery including seven (7) Teamsters. The Teamsters' job is to deliver materials to the plant, and drive the boom trucks, the water trucks, and the fuel trucks on the site. The most senior Teamster on the job is considered the foreman or crew leader.

Before GRP initially staffed the Refinery project, it obtained the names of the AECOM employees who had been working on the site. By November 15, 2017, GRP had a general understanding of which Teamsters were working at the Refinery. However, on or about that date, T3 sent an email message to the Teamsters' Business Manager Kevin Engelke seeking to

confirm the list of Teamsters working at the Refinery. Engelke confirmed the names on the list (tr. 155-156).

Among the names on the list were two brothers, Mike and Bob Hamilton (tr. 156, 164). Mike Hamilton's name stood out to T3 because several years earlier, he had been involved in a verbal altercation with Mike Hamilton (tr. 156). Because of that altercation and T3's perception of Mike Hamilton's personality, T3 did not believe Mike Hamilton would be a good fit for the Refinery job. T3 found Mike Hamilton's personal manner offensive; he considered him to be a bully and a toxic presence on the job (tr. 166-167, 203, 204, 207). The Refinery imposed strict standards for behavior at the site, and even maintained a list of tradespersons it barred from its facility (tr. 63-64). T3 believed the personal animosity between Mike Hamilton and him precluded him from employing Mike Hamilton (tr. 166). Therefore, T3 informed the Teamsters that he did not wish to have Mike Hamilton referred to the Refinery job (tr. 28-29).

The incidents that created the animosity between T3 and Mike Hamilton arose on a large project managed by GRP in 2004. In the course of the work on the project, Mike Hamilton engaged in a verbal altercation with T3's brother Mike DeClue, an operating engineer on the job, because Mike was hauling a pump from one location on the project to another location using his pickup truck. Mike Hamilton angrily asserted that movement of the pump was Teamster work and he physically removed the pump from Mike DeClue's truck. The dispute escalated to the point that the then-Business Manager for the Teamsters, Dale Stewart, was forced to intercede and restore order (tr. 158-159).

Soon afterwards, Mike Hamilton visited T3 at his office. Mike Hamilton was screaming and yelling at T3 for moving a pump on a different job without using a Teamster to perform the

work. T3 described the diatribe as “louder than a jackhammer”. The argument became so heated that Dale Stewart (who apparently happened to be present in the office area at the time) intervened. Stewart asked if T3 wanted to cancel the Teamster contract. T3 responded that he did not want to terminate the contract. Stewart instructed Mike Hamilton to leave the office and Stewart removed Mike Hamilton from that job (tr. 159—161). GRP then sent Mike Hamilton to work at a project for Southern Illinois University at Edwardsville, Illinois (“SIU Edwardsville”) (tr. 163, 83—84).

Some undefined period later, T3 decided to lay off Mike Hamilton. T3 enlisted the aid of a GRP Project Manager Ray Wesley to accompany him to the SIU Edwardsville jobsite. At the site, T3 informed Mike Hamilton he was being laid off. According to Hamilton, T3 told him that he was “just too union” to work for GRP (tr. 85). Both T3 and Wesley vigorously denied that T3 made that comment or any comment about unions during the conversation (tr. 163, 226-227).

Shortly thereafter, Mike Hamilton complained to the Union about his removal from the SIU Edwardsville job. Although Mike Hamilton claims he filed a grievance over the matter (tr. 86-87), the Teamsters were unable to locate any grievance ever filed against GRP (tr. 47). In any event, after discussions between Dale Stewart and Tom DeClue, Jr., T3’s father, Mike Hamilton returned to GRP to work for T3’s father on his projects (tr. 88). T3 acknowledged at hearing that he was disturbed by his father’s action, and he was cool to Mike Hamilton as a result (tr. 188).

After about a week, Dale Stewart removed Mike Hamilton from his jobs at GRP (tr. 88). The Company had not requested the Union remove Hamilton from the jobs. Apparently, Dale Stewart decided the employment relationship was not working out (tr. 88). Mike Hamilton did

not work for GRP again after this series of incidents in 2004 (tr. 90; G.C. Ex. 14). This sequence of events was responsible for the personality conflict between Mike Hamilton and T3, and influenced T3's decision to reject Mike Hamilton for the Refinery job in 2017.

The Union never attempted to persuade T3 to accept Mike Hamilton on the Refinery job. The Union filed neither a grievance nor an NLRB charge over the Company's refusal to accept Mike Hamilton on the job (tr. 72, 73). The Union merely asked the Company to memorialize its refusal to accept Mike Hamilton. T3 communicated the Company's position in a letter dated November 28, 2017 (GC Ex. 3) and in an undated letter sent to the Union on December 18, 2017 (GC Ex. 8).

The other name that stood out on the list of AECOM Teamsters at the Refinery was Bob Hamilton, Mike's brother. T3 was not personally acquainted with Bob Hamilton since Bob had not, to T3's knowledge, previously worked for GRP (tr. 164). However, T3 was concerned that as Mike's brother, Bob would be unable to keep Mike Hamilton's personality in check given the past conflict between Mike Hamilton and T3 (tr. 165). Therefore, T3 initially told Kevin Engelke that he did not want to employ Bob Hamilton at the Refinery either (tr. 167).

At a lunch meeting, the Union attempted to persuade GRP to employ Bob Hamilton at the Refinery. They asserted that Bob was not like his brother Mike and would not cause hostilities or create a personality conflict with T3. As a result, T3 decided to accept Bob on the job (tr. 168). T3 told Phillips Refinery that they planned to accept Bob Hamilton on the job even though the Company had initially indicated that it planned to reject both Hamiltons. Phillips was willing to accept T3's judgment about Bob Hamilton until December 1, 2017 (tr. 170-171). At that time, T3 learned from his brother that a rumor was circulating around the Refinery. The

rumor was that Bob Hamilton was claiming he would only operate a boom truck but would not train other Teamsters on the job; he would do his work and that was all (tr. 169). This rumor reached Phillips and they instructed T3 again to reject Bob Hamilton for employment at the Refinery (tr. 171).

The Refinery's position placed T3 in a dilemma. The Teamsters denied the rumors about Bob Hamilton and assured T3 that Bob would be a good employee. However, Phillips now was unwilling to have Bob Hamilton work at the Refinery. Therefore, T3 developed a plan to hire Bob Hamilton as the replacement for GRP's "shop driver" who was about to retire (tr. 172). The "shop driver" was responsible for hauling materials and product to and from GRP's fabrication shops. It is a critical position in the Company that carried significant responsibility (tr. 172). It is also a stable position because it is not subject to being eliminated when a job ends or if another contractor on a project replaces GRP (tr. 173). Moreover, because work at the Refinery is compensated at a discounted rate, the shop driver position is more lucrative financially since it received the full wage rate under the Local 525 construction industry contract.

On December 6, 2018, GRP Executive Vice President Dan Dotson, T3, Kevin Engelke, Teamsters Business Representative Brett Wessel, and Bob Hamilton met at GRP's offices to discuss Bob Hamilton's potential employment by the Company. At the meeting, T3 raised the possibility of awarding the shop driver job to Bob Hamilton (tr. 173). Bob Hamilton spoke at length in the meeting about the work at the Refinery and the Union representatives left the office with Bob Hamilton (tr. 174-175). Fearing they had left unclear Bob Hamilton's desire to accept the shop driver job, the Union representatives returned to T3's office with Bob Hamilton and Bob Hamilton formally indicated he wanted the shop driver job (tr. 175). However, as the

parties were shaking hands, Bob Hamilton requested the opportunity to work at the Refinery on weekends (tr. 175). T3 immediately became concerned that Bob Hamilton's true desire was to work at the Refinery and that he was not interested in or committed to the shop driver job. T3 just said that the shop driver does not have time to work at the Refinery on weekends because he is occupied at the shop (tr. 176). Ultimately, Bob Hamilton's parting comment compelled T3 to decide at that moment that he would not employ Bob Hamilton as the shop Teamster either because Bob Hamilton did not appear unequivocally enthusiastic for the job-one that T3 viewed as critically important to the Company's operations (tr. 176).

T3 verbally informed the Union that GRP decided not to employ either Mike or Bob Hamilton. The Teamsters requested a letter memorializing the Company's decision in that regard. Accordingly, on December 18, 2017, T3 sent a letter to the Union rejecting both Mike and Bob Hamilton for positions with GRP (G.C. Ex. 8).

III. WITNESS CREDIBILITY

The parties dispute many of the essential facts underlying this case. In order to understand and evaluate GRP's assertion that the allegations of the Complaint are meritless, the ALJ must decide which version of the facts to believe. In particular, serious conflicts exist between the testimony of Tom DeClue III and Ray Wesley on the one hand, and Mike and Bob Hamilton on the other hand. Respondent submits that where such factual conflicts arise, the honest, forthright, consistent, and plausible testimony of its witnesses should prevail over the inconsistent, implausible and contradictory testimony of General Counsel's witnesses.

The primary focus of this credibility analysis is the testimony of Mike Hamilton. Simply put, Mike Hamilton's self-serving, evasive and contradictory testimony is unworthy of belief.

Mike Hamilton's selective recall and tendency towards hyperbole make his testimony utterly unreliable.

Mike Hamilton demonstrated his true personality and character in a series of comments he made at hearing. First, and most telling, Mike Hamilton candidly admitted on cross-examination "I don't really care if anybody likes me." (tr. 99). In describing his interactions with members of management and other crafts on the Refinery job in 2004, he stated, "I was myself." (tr 250). He admitted that he raised his voice on the job and used coarse language, yet inexplicably he denied hostile interactions with T3 stating, "That's just not my nature." (tr. 249). Then, he claimed he could not deny that he yelled at T3; he simply could not remember doing so (tr. 244, 248) and he could not remember whether he yelled at others on the job (tr. 248). This testimony directly contradicts his earlier testimony that he never yelled or cursed at T3 (tr. 111) and that he never engaged in arguments with anyone at GRP (tr. 96). It is also inconsistent with his admission that he did raise his voice and use coarse language at times (tr. 250). Mike Hamilton's testimony also conflicts with that of Ray Wesley, a neutral witness, who characterized Mike Hamilton's manner on the job as "loud and obnoxious" (tr. 223). Wesley added that Mike Hamilton tried to be intimidating (tr. 228).

Mike Hamilton also exhibited very selective and vague recall of the incident where he ordered Mike DeClue to cease moving a pump and physically removed the pump from Mike DeClue's truck. Mike Hamilton admitted his recall of the incident was weak (tr. 248). He denied grabbing the pump from the truck (tr. 244), delivering any material at Premcor (tr. 245), or even talking with Ray Wesley on that project (tr. 246). Mike Hamilton denied that one person could lift the pump, claiming it weighed two hundred pounds (tr. 244, 249). He also

claimed that Danny Miller was working for GRP at the time of the incident (tr. 105) when, in fact, Miller left the Company before 2004 (tr. 149).

Mike Hamilton's most egregious misstatement was his testimony that T3 told him he was laid off from the SIU Edwardsville job in 2004 because he was "just too union" (tr. 85). Both T3 and Ray Wesley vigorously denied that T3 made this statement (tr. 163, 226-227). The statement, as reported by Mike Hamilton, is utterly devoid of context. Mike Hamilton claimed T3 had no issue with him before the layoff (tr. 97); that the layoff was totally out of the blue (tr. 112); there was no provocation for the layoff (tr. 251); and that he had no idea what T3 meant by the statement that he was "too union" (tr. 113). According to Ray Wesley, such a statement by T3 would have "resonated" with him because T3's company and life were built around union membership (tr. 227). The statement is completely implausible because T3 himself is a union member and so is virtually every member of his entire family (tr. 145). Moreover, most members of GRP's Board of Directors and most of its managers and supervisors are union members (tr. 145-146). Even Kevin Engelke testified that he believed GRP has the unions' interests at heart (tr. 58). Engelke added that he was not aware of any grievances or NLRB charges filed against GRP by the Union (tr. 72, 73).

The statement Mike Hamilton attributed to T3 is also illogical because both Ray Wesley and T3 testified that jurisdictional disputes are common on jobsites (tr. 196-197, 255) and T3 was not concerned about them (tr. 203-204). In addition, Mike Hamilton insisted he filed a grievance against GRP with the Teamsters over his lay off (tr. 96) but Kevin Engelke testified that he could not locate the grievance (tr. 47). The statement is also inconsistent with Kevin Engelke's observation that T3 and Mike Hamilton had a personality problem (tr. 67).

In contrast to Mike Hamilton's evasive and vague testimony concerning the Premcor job, neutral witness Ray Wesley recalled the incident vividly (tr. 222). Wesley testified that he believed Mike Hamilton was operating a fuel truck at the time of the incident and he specifically recalled Mike Hamilton loudly challenging the Company's transport of a pump by truck from one location at the plant to another (tr. 223). Wesley is not employed by GRP and has not been associated with that company for well over a decade (tr. 220). Although Wesley and T3 co-owned a small business at one time, that relationship ended twelve or thirteen years ago (tr. 219-220, 233). The General Counsel attempted to portray Wesley as uncooperative with the Agency but closely associated with T3 (tr. 233; 235). However, the evidence demonstrated that Wesley was equally uncooperative with Respondent in pre-trial preparation (tr. 240) and that Wesley spoke briefly and only once with T3 about the hearing or the events that transpired in 2004 (tr. 229-230). The evidence also established that the organization with which Wesley is now associated is supported by dues paid by GRP and 125 other employers (tr. 241). The mere fact that Wesley and T3 may be casual friends who may speak to one another "once every few months" (tr. 235) does not provide sufficient motivation for Wesley to lie under oath for GRP. Indeed, Wesley was subpoenaed by Respondent to appear at the hearing. He did not attend the hearing voluntarily (tr. 229).

Tom DeClue III also testified in an honest forthright manner in stark contrast to Mike Hamilton. T3 candidly acknowledged that he had been cool to Mike Hamilton after his father brought Hamilton back to work in 2004 (tr. 188); and that his conversation with Mike Hamilton about the pump became heated to the point that he too was yelling (tr. 160). He testified that a pump such as the one at issue on the Premcor job actually weighs 80-90 lbs. and one person

(tr. 253-254) can move the pump. His testimony regarding the meeting with Mike Hamilton at SIU Edwardsville was consistent with the account offered by Ray Wesley (tr. 163, 226). T3's testimony concerning Mike Hamilton's demeanor on the job was also consistent with the characterization offered by Ray Wesley. T3 referenced Mike Hamilton's tendency to yell and argue (Tr. 255) while Wesley characterized Mike Hamilton as "loud and obnoxious" (tr. 223). T3's characterization of Mike Hamilton is generally consistent with his statement to Kevin Engelke that, "There is some people you just don't get along with and Mike Hamilton is one of them people." (tr. 28).

IV. RESPONDENT'S CONDUCT DID NOT VIOLATE THE ACT

The Act does not require people to get along with each other. The Act does not prohibit an employer from declining to hire an individual because of personal animosity. Simply put, an employer need not hire someone it does not like. GRP was not obligated to hire Mike Hamilton when its President, Tom DeClue III, disliked Mike Hamilton personally. GRP also was not obligated to hire Bob Hamilton when it honestly believed Bob Hamilton failed to demonstrate a commitment to performing the work of shop Teamster. This charge has no merit and the ALJ should recommend dismissal of the charge in its entirety.

A. Respondent Lawfully Discharged Mike Hamilton

The General Counsel alleged Respondent refused to hire Mike Hamilton because he engaged in union or protected concerted activities. The General Counsel bears the initial burden of presenting a *prima facie* case that Mike Hamilton's union or protected concerted activities were a motivating factor in Respondent's decision not to employ him. To establish a *prima facie* case, the General Counsel must present evidence demonstrating Mike Hamilton

engaged in union or protected concerted activities, that Respondent knew of these activities, and that these activities were causally related to Respondent's decision not to hire Mike Hamilton. Even assuming *arguendo*, the General Counsel can establish the first two elements of its *prima facie* case, it simply cannot establish the third and final element of proof.

To find an unlawful motive for Respondent's refusal to hire Mike Hamilton, the General Counsel must go back fourteen (14) years in time. The record is devoid of any evidence that Mike Hamilton engaged in any recent union or protected activity that would have distinguished him from any other Teamsters GRP did hire. Instead, the record is clear that whatever triggered Respondent's decision not to hire Mike Hamilton happened in 2004.

The General Counsel will argue that Respondent refused to hire Mike Hamilton because he aggressively attempted to defend the Teamsters' craft jurisdiction in 2004 through a series of vigorous complaints about other crafts performing "Teamster work." The General Counsel will point to undisputed evidence that Mike Hamilton raised jurisdictional claims on jobsites in 2004 and T3 was aware of these claims.

The General Counsel's argument is fatally flawed for two reasons. First, Mike Hamilton's activities in 2004 were unprotected because of the manner by which he chose to raise his jurisdictional claims. Second, Respondent did not refuse to hire Mike Hamilton because he made these claims. It refused to hire him because his means of expressing his concerns created a personality conflict between he and T3, and this personality conflict was the basis for GRP's refusal to hire Mike Hamilton.

Although the Board accords an employee some latitude in forcefully presenting a grievance, that employee will lose the protection of the Act if he or she engages in opprobrious

conduct. See e.g., *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003) (using deliberate outrageous exaggerations during a safety complaint); *Hoboken Shipyards, Inc.*, 275 NLRB 1507, 1517 (1985) (screaming vulgarities at a supervisor); *SSA Pacific, Inc.*, 2018 LEXIS 142, 210 LRRM 2264 (NLRB 2018) (disrupting union referrals from a hiring hall). The Board employs no bright line test to determine when aggressive presentation of a complaint or grievance becomes opprobrious conduct. Instead, the Board examines the circumstances and rules on a case-by-case basis.

Here, Mike Hamilton crossed the line into opprobrious conduct two separate times. First, he confronted his supervisor Ray Wesley in a “loud and obnoxious” manner, attempted to remove a pump from a pickup truck claiming transport of the pump was Teamster work, and he caused a fifteen (15) minutes hiatus in the work. Mike Hamilton’s denial that the incident even occurred rings hollow when Wesley is able to vividly recall the incident fourteen (14) years later. Wesley is a neutral witness with no motive to fabricate his testimony, and his account of the incident should be credited over Mike Hamilton’s general denial.

Moreover, Mike Hamilton’s tendency to escalate verbal confrontations beyond reasonable limits is further evidenced by his tirade in T3’s office a few days later. Mike Hamilton entered the office of the Company’s President unannounced and uninvited and proceeded to harangue him in a tone that T3 characterized as “yelling” until Dale Stewart interceded and removed Mike Hamilton from the office. The General Counsel presented no evidence that the tirade was provoked by Respondent. Indeed, Mike Hamilton initially denied that he ever argued with T3, eventually conceding that he could not remember the incident. His lapse of memory is curious because T3 recalled the incident fourteen (14) years later, so it

must have left him with a significant emotional reaction to the incident. Also curious is the General Counsel's failure to call Dale Stewart, the former Business Manager of the local union, to testify given that T3 places him directly in the middle of the confrontation. Given the involvement of the Union's counsel in filing the charge, Respondent submits that it is entitled to an adverse inference that Dale Stewart's testimony would have supported T3.

The General Counsel may argue that Mike Hamilton was entitled to more latitude because he was serving as Union Steward on the job. However, the filing of a grievance did not trigger this confrontation. According to the Teamsters' own records, no grievance was ever filed against GRP. T3 was completely unaware of the context for Mike Hamilton's opprobrious actions. He was simply sitting in his office when Mike Hamilton burst in. The Board has never countenanced a Union representative initiating an out-of-control screaming contest with a Company president.

Mike Hamilton's conduct on both of these occasions was simply beyond the pale and wholly unprotected. The Act does not prohibit an employer from refusing to hire an individual for engaging in unprotected conduct. Given that the conduct was unprotected, the General Counsel's prima facie case fails for want of a critical element and the Complaint must be dismissed.

Even if, contrary to Respondent's assertions, the ALJ concludes that Mike Hamilton's conduct in 2004 was protected under the Act, the General Counsel still cannot establish a violation of the Act. The General Counsel must still demonstrate a nexus between the protected activity and the refusal to hire Mike Hamilton. That nexus does not exist. Respondent did not refuse to hire Mike Hamilton because he vigorously asserted the Union's

jurisdiction over certain work; it refused to hire Mike Hamilton because T3 did not like him and did not believe he was a good fit for the Refinery job. This may be a fine distinction, but it is a critical one because discharging, or by analogy, refusing to hire, an individual due to personal animosity is not a violation of the Act. See e.g., *Graham Ford, Inc.*, 179 NLRB 617, 619 (1969); *National Mattress Company*, 111 NLRB 890, 905 (1955).

Nowhere is this distinction more clear than in the testimony of Kevin Engelke. Engelke testified that T3 told him at a breakfast meeting when referring to Mike Hamilton that, “Some people you just don’t get along with.” (tr. 28). Engelke himself opined that T3 and Mike Hamilton had personality problems (tr. 67).

Engelke also acknowledged that the Refinery is very demanding and a “tough customer” (tr. 63) that maintained a “banned list” of individuals it did not wish to have work on its site (tr. 63). Engelke acknowledged that a local contractor like GRP taking over a maintenance contract from the largest construction and engineering firm in the world was a very significant event (tr. 62). He conceded that T3 was under considerable pressure to perform (tr. 62). He admitted that, under these circumstances, GRP was not in a position to take chances with the manner in which it initially staffed the job (tr. 63). Thus, T3’s concern about Mike Hamilton’s abrasive personality was an acute problem on the Refinery job. GRP simply was not in a position to take chances on Mike Hamilton’s volatile personality.

Mike Hamilton himself acknowledged the tension between the two men when he said he thought after the passage of years, “bygones were bygones” (tr. 104). T3 testified that he did not believe “Mike’s personality would gel with us as a company” (tr. 181). T3 added, “Yelling and arguing is central to Mike.” (tr. 255); and that the issue was not jurisdictional

disputes but rather, “This is a Mike thing.” (tr. 255). T3 told Dale Stewart in 2004 that, “Mike and I, our personalities conflict. We don’t get along.” (tr. 162).

The additional evidence adduced by Respondent at hearing bears out T3’s statements. On the one hand, jurisdictional disputes on GRP projects are commonplace and generally resolved at the project level (tr. 254, 196-197, 203-204) so Mike Hamilton’s jurisdictional claims were unremarkable. On the other hand, Respondent had no reason to be concerned about Mike Hamilton raising jurisdictional disputes on the Refinery job because the GPPMA effectively eliminated such disputes (tr. 55, 56, 154, 196-197) and the business managers for the various unions had committed in writing to minimize such disputes (tr. 57).

In addition, GRP has a history of tolerance towards employees who file grievances. This history makes it extremely unlikely that Respondent would have rejected an applicant for employment simply because the individual had engaged in grievance-filing activities. The record demonstrates that Ryan Geisler filed a grievance on behalf of seventy (70) employees in a variety of crafts in early 2017. The grievance was heard at Step 5 in West Virginia. Respondent lost the grievance and paid the seventy (70) grievants. Ryan Geisler continues to work for Respondent (tr. 177-178). GRP settled another grievance filed in December 2017 by twelve (12) Boilermakers seeking compensation for improper pay by paying the employees the sums demanded. The foreman who initiated the grievance is still employed by GRP (tr. 178). The Company also paid a third grievance filed by Joe Harrelson challenging his discharge by GRP and Joe Harrelson has not been banned from recall to the Refinery job (tr. 179).

The General Counsel’s assertion that Respondent’s refusal to employ Mike Hamilton is also at odds with Respondent’s proud union heritage. As noted previously, virtually every one

of Respondent's owners, officers, directors, managers and supervisors is a union member. Even Kevin Engelke admitted that GRP has the unions' best interests at heart (tr. 58) and that GRP is a friend of organized labor (tr. 54). Indeed, Engelke credited T3 with helping to keep a non-union firm out of the Refinery (tr. 53). When Dale Stewart offered to tear up the Teamsters' contract with GRP after Mike Hamilton's altercation with T3 in 2004, T3 replied that this was not what he wanted (tr. 161). None of the General Counsel's witnesses explained why T3 would suddenly defy his union heritage to discriminate against Mike Hamilton due to his union activities. The premise simply defies logic.

In sum, the manner of Mike Hamilton's complaints about jurisdictional issues was unprotected. Even if the activities were protected, Respondent refused to hire Mike Hamilton because of a personality conflict between him and T3 and not because Mike Hamilton asserted jurisdictional claims on the job. The allegations of the Complaint regarding Mike Hamilton have no merit. The ALJ should recommend dismissal of these allegations.

B. Respondent's Failure to Hire Bob Hamilton Did Not Violate the Act

The allegations of the Complaint related to Bob Hamilton are derivative. In substance, the General Counsel argues Respondent unlawfully failed to hire Bob Hamilton at the Refinery because Bob is Mike Hamilton's brother and Respondent unlawfully failed to hire Mike Hamilton. The Complaint does not allege any independent union or protected activities in which Bob Hamilton engaged, and the record at hearing is devoid of any evidence of such activities. In fact, Bob Hamilton expressly denied engaging in any particular activity (tr. 128-129). Thus, if, as Respondent asserts, the General Counsel failed to establish a violation of the

Act by virtue of Respondent's refusal to hire Mike Hamilton, *a fortiori*, the General Counsel failed to establish a violation by virtue of Respondent's refusal to hire Bob Hamilton.

In any event, ultimately, Respondent did not refuse to hire Bob Hamilton because of his brother. Respondent was willing to hire Bob Hamilton at a job more stable and important than the Refinery job. Ultimately, Respondent rejected Bob Hamilton for a position with the Company because he refused wholeheartedly to commit to the job he was offered by Respondent - the job of shop driver. If Bob Hamilton had made a sincere commitment to accepting the shop driver job without conditions, he would be working for Respondent today.

The Complaint alleges only Respondent's failure to employ Bob Hamilton at the Refinery. However, the General Counsel presented evidence concerning Respondent's offer to Bob Hamilton of employment as a shop driver. Although unstated, presumably the purpose for this testimony was to demonstrate Respondent's continuing animus towards Bob Hamilton. If that was the purpose for adducing evidence of the later offer of employment, the assertion of continuing animus toward Bob Hamilton is simply wrong.

Most of the relevant facts concerning the shop driver job are undisputed. The only variance in testimony relates to the meeting on December 6 during which Respondent offered Bob Hamilton the shop driver job. Bob Hamilton testified that he opened the meeting by reading a letter about his tenure on the Refinery project (tr. 123-124); while T3 testified that he told Bob Hamilton up front at the meeting how important the shop driver job was to the organization and he offered him the job (tr. 173, 174).

This minor variance is inconsequential because Bob Hamilton conceded he raised the issue of working weekends at the Refinery (tr. 124). Kevin Engelke confirmed that Bob

Hamilton talked about working at the Refinery during both the initial conversation on December 6 and during the subsequent conversation after the Union contingent went out into the parking lot to talk and returned to the Company's offices (tr. 70, 71). Engelke testified that Bob Hamilton talked a lot about the Refinery during the meeting (tr. 70). Thus, the record is undisputed that although Respondent attempted to offer Bob Hamilton the shop driver job, Bob Hamilton continued to pursue work at the Refinery (tr. 124).

Bob Hamilton's failure to focus on the shop driver job was a "red flag" for Respondent. The job is critical to GRP (tr. 172, 175). The job involved constantly moving material to keep all the crafts supplied on jobs on a daily basis (tr. 172). In recognition of its importance, the job pays significantly more than work at the Refinery (tr. 173). The work is more stable and less prone to layoffs (tr. 173). During the December 6 meeting, T3 felt that he had to keep "dragging" Bob Hamilton back to the shop driver job and away from the work at the Refinery (Tr. 174). He did not feel that Bob Hamilton was engaged in the conversation about the shop driver job (tr. 175). T3 even remarked to Denny Tolbert, the Teamster that held the shop driver job, that Bob Hamilton wanted to work at the Refinery; that he did not want to be in the shop, he wanted to be at the Refinery (tr. 175). Bob Hamilton's equivocation was evident because he did not immediately express the desire to obtain the shop driver job. Instead, he first went outside and talked to the Teamster Business Representatives before deciding to express his desire for the job and notifying GRP of his decision (tr. 175).

When Bob Hamilton stated he wanted the shop driver job but in virtually the same breath, asked again about working at the Refinery on weekends (tr. 175, 124), T3's suspicion was confirmed that Bob Hamilton was not really interested in the shop driver job and wanted

to work at the Refinery. At that moment, T3 decided not to hire Bob Hamilton either. His decision was completely unrelated to union activities or protected activities or to Bob Hamilton's familiar relationship with his brother. Thus, on this basis alone, the complaint allegations concerning Bob Hamilton should be dismissed.

The General Counsel will assert that Respondent declined to hire Bob Hamilton at the Refinery because it feared he would engage in union or protected activities like his brother. The assertion is fallacious for two reasons. First, of course, Mike Hamilton did not engage in any protected activities that could be imputed to his brother. Second, the issue with Mike Hamilton was not his decade plus old complaints about Teamster jurisdiction, but rather his personality and manner for expressing his complaints. Respondent was concerned that Bob Hamilton's personality would be similar to his brother's. He was also concerned that Bob Hamilton would be unable to manage his brother Mike given Mike's history with T3.

The concern was exacerbated by rumors circulating at the Refinery that Bob Hamilton was expressing his reluctance to train other Teamsters or do any work other than operating the boom truck (tr. 31, 121, 133, 169, 170). Kevin Engelke attempted to debunk these rumors in conversations with T3 (tr. 169-170,168). Indeed, it is undisputed that Engelke successfully persuaded T3 that Bob Hamilton would be a good fit for the Refinery (tr. 168). While Engelke was able to convince T3 that Bob Hamilton would make a good addition to the Refinery project, the Refinery itself balked at having Bob Hamilton back in the workforce based on the rumors it had also heard (tr. 171). This left T3 with a dilemma since he now believed Bob Hamilton would be a good employee. He resolved this conundrum by considering Bob Hamilton for the shop driver job (tr. 172).

T3 never expressed concern that, if hired, Bob Hamilton would engage in union or protected activities. As noted above, GRP as a company was respectful of such activities and has continued to employ several individuals who filed grievances or otherwise engaged in activity on behalf of the Teamsters. T3's concerns were centered on reservations about Bob Hamilton's personality and about his possible adverse reaction to GRP's refusal to hire his brother. T3 had just placed his company and himself under great pressure by obtaining the Refinery contract. He doubled the size of his company virtually overnight and placed himself in a position of servicing a customer that even the Union characterized as "tough." T3 needed to ensure a workplace without drama and volatility. These concerns do not implicate the protections of the Act. Therefore, the mere coincidence of a familial relationship with Mike Hamilton was insufficient to imbue Bob Hamilton with an aura of protection under the Act.

C. The Case Should be Deferred to the Grievance Arbitration Process

The allegations of the Complaint have no merit. However, the case should not have been litigated at all. Mike and Bob Hamilton are both represented by a union. GRP and the Union are both party to a collective bargaining agreement containing a grievance procedure (tr. 107). GRP has expressed its willingness to waive time limitations on filing a grievance and processing it to arbitration (tr. 181). In short, GRP is willing to submit this case to an arbitrator.

The Board has long expressed a preference for informal resolution of disputes. See, *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984). Although not binding on the Board, in GC Memo 18-02, the General Counsel recently reemphasized the Agency's commitment to resolution of charges through the grievance/arbitration process by rescinding the more restrictive view of deferral expressed in

GC Memo 12-01. Despite the GC's renewed commitment to deferral, inexplicably, the Regional Director, acting on behalf of the General Counsel, did not defer the underlying charge to the Parties' grievance/arbitration process. However, that process is still available and it remains the appropriate forum for resolution of the issues raised by the Complaint. The General Counsel has not offered any basis for declining to defer this case and none appears in the record. Accordingly, Respondent asserts that a grievance encompassing the allegations of the Complaint be deferred to the parties' grievance/arbitration process and that the Complaint be dismissed and the case remanded to the Regional Director for further appropriate action.

V. CONCLUSION

The statement by Mike Hamilton that, "I don't really care if anybody likes me," (tr. 99) resonates. Mike Hamilton did not care that appearing unannounced in the office of his employer's president and screaming at him to the point that a third party was forced to intervene was inappropriate. He did not care that he behaved in a loud and obnoxious manner when he angrily questioned his employer's assignment of transporting a pump to another craft and then attempted to enforce a self-help remedy by physically removing the pump from the truck (tr. 223-224). His response to this type of behavior was an unapologetic, "I was myself." (tr. 250).

Mike Hamilton had been a toxic presence on a GRP project in 2004 and T3 was unwilling to let his personality pollute and disrupt another project. This is the true and only reason T3 rejected Mike Hamilton for referral to the Refinery project. The General Counsel failed to prove that Respondent failed to hire Mike Hamilton because of his union or protected activities. The ALJ should recommend dismissal of this allegation.

Bob Hamilton could, and would, be working for GRP today if he had simply demonstrated a modicum of interest in the job the Company offered to him. Bob Hamilton was so fixated on working at the Refinery instead of actively pursuing a much higher paying and more stable position with Respondent that he proverbially snatched defeat from the jaws of victory in the course of his interview for the job. As to the Refinery job, Bob Hamilton was an unfortunate victim of his brother's toxic personality as well as rumors about his own willingness to provide dedicated service to the Refinery. As he freely admitted, he did not himself engage in any activities protected under the Act. In these circumstances, the General Counsel failed to establish a violation of the Act and the ALJ should similarly recommend dismissal of the allegations of the Complaint relating to Bob Hamilton.

For the reasons set forth in this brief, the ALJ should recommend dismissal of the Complaint in its entirety and Respondent urges the ALJ to so find. Alternatively, Respondent urges the ALJ to recommend deferral of this case to the parties' grievance/arbitration process.

Respectfully Submitted,

JACKSON LEWIS P.C.



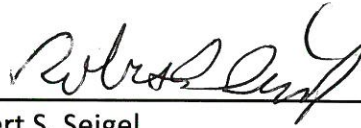
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CERTIFICATE OF SERVICE

The undersigned certifies that on July 27, 2018, the foregoing Respondent's Brief to the Administrative Law Judge was filed with the Chief Administrative Law Judge, National Labor Relations Board, using the Board's electronic filing system; and a copy of the foregoing was served on the same date upon the following parties by electronic mail:

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